No. 87-1309

In the Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL SCALLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

14 pp

QUESTIONS PRESENTED

1. Whether the jury instructions on the elements of a continuing criminal enterprise constituted plain error.

2. Whether there was sufficient evidence to support petitioner's conviction for engaging in a continuing criminal enterprise.

3. Whether the exclusion of certain impeachment evidence was harmless error.

4. Whether the district court committed plain error in directing petitioner to answer certain questions during cross-examination.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. C1-C10) is reported at 829 F.2d 37 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1987. A petition for rehearing was denied on December 8, 1987. The petition for a writ of certiorari was filed on February 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 1); conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in

violation of 21 U.S.C. 846 (Count 2); use of a telephone to facilitate the offenses charged in Counts 1 and 2, in violation of 21 U.S.C. 843(b) (Count 3); interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3) and 2 (Count 4); and intimidating a witness with intent to prevent the communication of information relating to the commission of federal offenses, in violation of 18 U.S.C. 1512(a) and 2 (Count 6).[1] He was sentenced to an aggregate term of 35 years' imprisonment and was fined $100,000. The court of appeals affirmed (Pet. App. C1-C10).

1. The evidence at trial is summarized in the government's brief in the court of appeals. It shows that between 1982 and 1984, petitioner directed a large cocaine distribution ring. In September 1982, petitioner was contacted by William Grimes, who offered to provide petitioner with a steady supply of cocaine. Over the next few months, William Grimes and his brother, Alton "Pete" Grimes, supplied petitioner with two to four pounds of cocaine on each of at least four occasions. Gov't C.A. Br. 6-7.

At the end of 1982, petitioner stopped using William Grimes as a source of cocaine. Thereafter, Pete Grimes' wife Jackie became petitioner's cocaine supplier. On at least three occasions in late 1982 and early 1983, she transferred money from petitioner to David Reimsnider, who in turn supplied cocaine for delivery to petitioner. Pet. 8-9; Gov't C.A. Br. 7.

The evidence established that there were several other members of petitioner's narcotics organization. For example, the prosecutor introduced lawfully intercepted telephone

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[1] Petitioner was acquitted on one count of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 5). Petitioner's wife and co-defendant, Patricia Lee Scallio, was convicted on the only count in which she was charged, conspiracy to distribute cocaine and to possess cocaine with intent to distribute it.

conversations in which Edward "Butch" Phillips, petitioner's associate and business partner, referred to petitioner frequently as "Boss" and engaged in coded discussions pertaining to narcotics. The evidence also identified Charles E. Perry, Jr., as one of petitioner's confederates. Perry agreed to cooperate with the authorities, and shortly thereafter, petitioner approached Perry and told him that "People who rat on people have someone come around and shove a gun down their throat and blow their head off." Gov't C.A. Br. 8-10.

On December 13, 1984, federal agents executed a search warrant at petitioner's residence. The agents found a ledger detailing numerous drug purchases in 1982 and 1983, as well as drug paraphernalia, formulas, substances used for cutting cocaine, and firearms. The narcotics ledger showed the quantities of cocaine purchased, the amounts paid for the cocaine, the degrees of purity, and the profits obtained upon resale. The ledger showed that petitioner had purchased a total of approximately 160 pounds of cocaine between May 1982 and December 1983, that he had grossed almost $7 million in sales, and that he had netted more than $2 million in profits. Gov't C.A. Br. 11-14.

Petitioner testified at trial and denied that he had ever been involved in the drug business as a purchaser, seller, or financier (Pet. App. G4-G5). On cross-examination, the prosecutor inquired at length about petitioner's tax returns during the years 1981-1983 (*id.* at G15-G45). After the prosecutor had asked several questions on that subject, petitioner asked the trial court, "Is this a tax case I am in?" (*id.* at G19). The court admonished petitioner to "answer the questions that the U.S. Attorney is propounding," and told petitioner that if the questions were improper, his counsel "would certainly stop them" (*ibid.*).

The district court charged the jury that to convict petitioner of a continuing criminal enterprise (21 U.S.C. 848)

under Count 1, it must find, beyond a reasonable doubt (C.A. App. 308):

> First: That the defendant Samuel Scallio committed at least one of the violations of the federal narcotics laws specified in Counts II, III, and V of the indictment. These counts, as you have heard, charge a conspiracy to violate the federal narcotics laws and specific substantive offenses enumerated in the federal narcotics laws. Each of the overt acts described in the conspiracy count of the indictment alleges a felony violation of the federal laws.

The court also instructed the jury that under Section 848 the foregoing violation of the federal narcotics laws must be part of a "continuing series of violations" (C.A. App. 309):

> [T]he term "series" generally means "three or more" and the term continuing means "enduring" existing for a definite period or intended to cover or apply to successive, similar occurrences.
>
> Thus, you must find beyond a reasonable doubt that the defendant Samuel Scallio committed three or more successive violations of the federal narcotics laws within the period of time set forth in the indictment and with a single or substantially similar purpose.

Petitioner did not object to any of those instructions (Pet. App. C5).

2. The court of appeals affirmed in an unpublished opinion (Pet. App. C1-C10). It rejected (*id.* at C5-C8) petitioner's challenge to the jury instructions on the elements of a continuing criminal enterprise. The court held (*id.* at C6) that although Count 1 specified only Counts 2 and 5 as predicate felonies, the trial court did not commit plain error by instructing the jury that Count 3 could also serve as a predicate offense. In so holding, the court of appeals explained (*ibid.*) that the first element of Section 848 re-

quires the government to prove that the defendant committed at least one felony violation of the narcotics laws. Because the jury convicted petitioner on Count 2—which *was* charged as a predicate in Count 1—petitioner could not have been prejudiced by the fact that the trial court also included Count 3 in its instruction as well. The court of appeals also rejected (Pet. App. C7-C8) the contention that the instructions permitted the jury to convict petitioner of a "continuing series of violations" based upon offenses not contained in Title 21. In addition, the court found (Pet. App. C4-C5) sufficient evidence that petitioner had organized, supervised, and managed at least five persons in the criminal enterprise. It also rejected (*id.* at C8) the claim that the trial court committed plain error in permitting the prosecutor to cross-examine petitioner about his tax returns. The court agreed (*id.* at C10) that the trial court should have allowed petitioner to call a witness to impeach the credibility of Jackie Grimes, a government witness, but it found that error to be harmless because Ms. Grimes' testimony was cumulative and because her credibility had been "extensively challenged" during her cross-examination by defense counsel. Finally, the court held (*ibid.*) that it was harmless error to deny petitioner's offer of an exculpatory statement made by Pete Grimes, whose co-conspirator declarations had been offered in the prosecutor's direct case.

ARGUMENT

1. Petitioner raises two challenges to the jury instructions on the elements of a continuing criminal enterprise under 21 U.S.C. 848. First, petitioner argues (Pet. 16-21) that the district court erroneously invited the jury to rely on offenses other than those contained in Title 21 in deciding whether petitioner committed a "continuing series of violations" for purposes of Section 848. Second, petitioner claims

(Pet. 21-22) that the trial court impermissibly amended the indictment by instructing the jury that it could convict petitioner under Section 848 if it found that he committed the federal narcotics felonies specified in Counts 2, 3, and 5, even though Count 1 of the indictment referred only to Counts 2 and 5 (Pet. 21-22). Petitioner failed to raise those objections at trial and accordingly may prevail only if the instructions constituted plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Young*, 470 U.S. 1 (1985). Petitioner cannot satisfy that standard.

a. Section 848, the continuing criminal enterprise statute, requires the jury to find, among other things, that a defendant has committed a felony violation of Title 21 and that "such violation is a part of a continuing series of violations" of Title 21 (21 U.S.C. 848(b)(1) and (2)). The courts have generally held that a "continuing series of violations" consists of three or more felony violations of the narcotics laws. See, *e.g.*, *United States* v. *Young*, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Chagra*, 653 F.2d 26, 27-28 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982). Petitioner asserts that the trial court's instructions permitted the jury to rely on the overt acts alleged in Count 2 of the indictment—two of which were not Title 21 felonies—as predicate acts for the continuing criminal enterprise conviction. That is not so. The court correctly instructed the jury that to find a continuing series of violations, it must "find beyond a reasonable doubt that the defendant Samuel Scallio committed three or more successive violations of the federal narcotics laws" (C.A. App. 309). To be sure, the trial court had earlier instructed that "[e]ach of the overt acts described in the conspiracy count of the indictment alleges a felony violation of the federal laws" (*id.* at 308). That statement, although unnecessary, plainly did not advise the jury that the overt acts contained in Count 2 could be used to estab-

lish the continuing series of Title 21 felonies required to prove a Section 848 violation. Viewed in their entirety (see *Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973)), the instructions made it clear to the jury that only violations of Title 21 could serve as predicate offenses for a conviction under Section 848. Certainly any possible ambiguity in the instructions on that score was not sufficient to constitute plain error. See *United States* v. *Young,* 470 U.S. at 15.[2]

b. The district court likewise did not commit plain error when it instructed the jury that it could convict petitioner under Section 848 (Count 1) if it found that he had committed at least one of the narcotics violations alleged in Counts 2, 3, and 5 of the indictment, even though Count 1 of the indictment referred only to Counts 2 and 5 as predicate acts. An indictment charging a violation of Section 848 need not list all, or even any, of the predicate acts. See *United States* v. *Rosenthal,* 793 F.2d 1214, 1226-1227 (11th Cir. 1986), cert. denied, No. 86-5872 (Mar. 9, 1987); *United States* v. *Becton,* 751 F.2d 250, 256 (8th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *United States* v. *Young,* 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Sterling,* 742 F.2d 521, 526 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985). It was sufficient that Count 1 tracked the language of Section 848 and that the district court correctly instructed the jury on the elements of that crime. Moreover, as the court of appeals explained

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[2] *United States* v. *Webster,* 639 F.2d 174 (4th Cir.), cert. denied, 454 U.S. 857 (1981), modified on other grounds on reh'g, 669 F.2d 185 (4th Cir. 1982), is not to the contrary. There, unlike here, the instructions expressly permitted the jury to rely on violations not contained in Title 21 in deciding whether to convict the defendant under Section 848. Moreover, even in the *Webster* case, the court of appeals upheld the Section 848 conviction, finding (639 F.2d at 181) that the jury had convicted the defendant on a "plenitude of counts" that were sufficient predicates under Section 848.

(Pet. App. C6), petitioner was not prejudiced by the court's instructions, since the jury convicted him on Count 2, which *was* specified as a predicate in Count 1 of the indictment.

2. Petitioner challenges the sufficiency of the evidence that he organized, supervised, or managed five or more persons in the continuing criminal enterprise. The court of appeals rejected that claim after a meticulous examination of the record (Pet. App. C4-C5). In particular, it found that petitioner had used Butch Phillips as his "lieutenant"; that petitioner's wife had purchased dilutant for the cocaine and had made certain financial arrangements relating to the cocaine operation; and that Jackie, Pete, and Billy Grimes had received money from petitioner and had delivered cocaine to him (*id.* at C4-C5, C8-C9). Petitioner's fact-bound challenge to the court's determination of the sufficiency of the evidence does not warrant further review.

3. a. Petitioner contends (Pet. 24-25) that the district court erred when it excluded the testimony of a witness he had called to challenge the veracity of Jackie Grimes, a government witness. The court of appeals agreed (Pet. App. C10) that testimony about the witness's poor reputation for truthfulness was admissible under Fed. R. Evid. 608, but it held that the trial court's failure to admit that testimony was harmless on the facts of this case. That decision is plainly correct. As the court noted (Pet. App. C10), the testimony of Jackie Grimes was largely cumulative, and her credibility was extensively challenged in other ways by petitioner. See *United States* v. *Basic Construction Co.*, 711 F.2d 570, 574-575 (4th Cir.), certs. denied, 464 U.S. 956 and 1008 (1983); *Osborne* v. *United States*, 542 F.2d 1015, 1018 (8th Cir. 1976).[3]

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[3] *United States* v. *Davis*, 639 F.2d 239 (5th Cir. 1981), on which petitioner relies (Pet. 24-25), is not to the contrary. In *Davis*, the court of appeals found that the impeachment testimony that was excluded

b. Petitioner also claims that the district court erred when it precluded him from offering an allegedly exculpatory statement by Pete Grimes. The statement, according to petitioner's proffer, was a post-conspiracy remark by Grimes to a Drug Enforcement Agency (DEA) agent that the DEA "got the wrong man" when it arrested petitioner. The court of appeals correctly found the ruling excluding that statement to be harmless error (Pet. App. C10). The statement, made to law enforcement agents after the termination of the conspiracy, was not made under circumstances providing significant assurances of trustworthiness. In the face of the overwhelming evidence of petitioner's guilt, the exclusion of that single remark could not have prejudiced petitioner.

4. Petitioner asserts (Pet. 26-29) that his Fifth Amendment rights were violated when the trial court directed him to answer the government's questions during cross-examination regarding his tax returns. Neither petitioner nor his attorney, however, raised a Fifth Amendment objection to the government's cross-examination.[4] Petitioner

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by the district court involved the "key government witness, * * * without whom the government would have had no case" (639 F.2d at 244). The court of appeals also held that under the Compulsory Process Clause of the Sixth Amendment, the district court lacked the authority to preclude defense testimony as a sanction for disobeying a discovery order—a result that cannot be squared with this Court's recent decision in *Taylor* v. *Illinois,* No. 86-5963 (Jan. 25, 1988).

[4] Petitioner acknowledges (Pet. 27-28) that his counsel made no objection at all, but insists that he objected himself when, during the examination, he remarked to the trial court "Is this a tax case I am in?" Even if that remark had been intended as a serious objection, it addressed only the relevance of the government's questions, not the tendency of those questions to incriminate petitioner, in violation of the Fifth Amendment. As such, petitioner's comment did not "make[ ] known to the court the action which [he] desire[d] the court to take or [his] objection to the action of the court and the grounds therefor" (Fed. R. Crim. P. 51; Fed. R. Evid. 103(a)(1)).

must therefore show that the questions concerning his tax returns constituted plain error. He has not made such a showing. Petitioner's fraudulent tax practices were relevant to impeach his credibility generally (see Fed. R. Evid. 608(b)), and they undermined petitioner's defense that he had obtained legitimate income from his wholesale car business. And by testifying at trial in his own defense, petitioner waived his Fifth Amendment privilege against compulsory self-incrimination with respect to all relevant inquiries on cross-examination. See, *e.g.*, *Brown* v. *United States*, 356 U.S. 148 (1958); *Johnson* v. *United States*, 318 U.S. 189, 195 (1943); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316 (1900). Petitioner's failure to object to those questions is thus "not 'waiver' of a right which had been denied but recognition that the action of the trial judge [in directing him to answer] was unexceptionable." *Johnson* v. *United States*, 318 U.S. at 203 (Frankfurter, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

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